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Issue Date: 18 February 2004

CASE NO.: 2003-LHC-419

OWCP NO.:07-162024

IN THE MATTER OF

JOHN F. MENARD,
Claimant

v.

COASTLINE, INC.,
AMS STAFF LEASING,
Employer

and

AMERICAN CASUALTY INSURANCE,
Carrier

APPEARANCES:

Quentin D. Price, Esq.
Barton, Price & McElroy
On Behalf of Claimant

Maurice Bostick, Esq.
Galloway, Johnson, Tompkins, Burr & Smith
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq. brought by John F. Menard (Claimant) against Coastline, Inc., and AMS Staff Leasing (individually Coastline and AMS) and American Casualty Insurance (Carrier)[1]. The issues raised by the parties could not resolve administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on November 18, 2003, in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post hearing briefs in support of their respective positions. Claimant testified and introduced 14 exhibits including various DOL forms (CX-1, 2); Claimant's medical records and bills (CX-3, 4); Claimant's pharmacy bills (CX-5); Claimant's tax, Social Security, and wage records (CX-7, 8); alleged co-worker information (CX-9); deposition of Dr. Larry Brown (CX-10); report of accident forms (CX-12); Employer AMS response to Claimant's discovery requests and motion for continuance (CX-13, 14); deposition of David Lynn Martin (CX-16).[2]

AMS called one live witness, Vocational Expert, Nancy Favaloro and introduced 20 exhibits including: Claimant's response to discovery (EX-1); DOL forms (EX-2); Depositions of Drs. Martin Barrash and Larry Brown (EX-3,4); medical records of Drs. Barrash, Brown, Ronald Corley, and Vernon Doster (EX-5, 6, 7, 8); an MRI report (EX-9); a surveillance video and report (EX-10, 11); Claimant's Social Security Records (EX-12); an accident report (EX-13); Claimant's personnel file (EX-14); payroll records (EX-15); a vocational rehabilitation report and labor market survey (EX-16); medical records from Beaumont Neurosurgical Spine Associates (EX-17); and various correspondence between the parties, and Dr. Corley dated October 7, 13, and November 7, 2003.

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[1] No representative for Coastline appeared at the hearing. AMS was represented by Attorney Maurice Bostick who represented that AMS was Claimant's employer.

[2] References to the transcript and exhibits are as follows: trial transcript- Tr.-_____; Claimant's exhibits- CX-____p____; Employer AMS exhibits EX-____p.____; Administrative Law Judge exhibit- ALJX-_____.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of the alleged injury was July 29, 2001.

2. The alleged injured occurred in the course and scope of Claimant's employment with AMS.

3. Claimant advised AMS of the alleged injury on July 29, 2001.

4. A Notice of Controversion was filed on February 19, 2003.[3]

5. Claimant received no compensation payments but did receive $1,733.00 in medical benefits.

2. ISSUES

The parties presented the following unresolved issues:

1. Whether Coastline was a borrowing employer such that it along with AMS constituted Claimant's Employer liable for compensation and medical benefits under the Act;

2. Whether Claimant was injured on July 29, 2001 and as a result sustained a disability;

3. Whether an intervening and superseding event was the cause of Claimant's alleged disability;

4. Average weekly wage;

5. Special fund relief;[4]

[3] Counsel for AMS filed a Notice of Controversion on February 18, 2003. Coastline filed no Notice of Controversion.

[4] Although raised by Employer as an issue, Employer never argued for such relief in its brief.

6. Suitable alternative employment;

7. Pre-existing condition;

8. Date of maximum medical improvement;

9. Reasonable and necessary medical expenses under Section 7 of the Act.

10. Attorney fees, penalties and interest.

III. STATEMENT OF THE CASE

1. Employer/Employee Status

Coastline. is a general contractor owned and operated by David Nolan and engaged in onshore and offshore fabrication work including pipe welding, structural welding, blast/painting and vessel code work employing about 50 to 100 welders at any given time depending upon contracts for its services. Coastline divides its work evenly between offshore and onshore assignments with onshore fabrication performed at Coastline's shop in Evadale, Texas. Once fabricated work is then shipped to various locations and installed by Coastline welders. (EX-14, p. 10).

On June 1, 2000, Coastline entered into an employee leasing agreement with AMS whereby AMS agreed to provide Coastline with employees and obtain worker's compensation and liability insurance and to hold Coastline harmless for all loss or expense sustained by occupational injuries of AMS employees in the performance of the leasing agreement. AMS agreed to pay all federal, state, or local taxes associated with labor furnish under the agreement and to pay employee wages while reserving the direction and control over all furnished labor including the right to hire, fire, discipline, and reassign said employees. (EX-14, pp. 1, 2, 8, 9).[5]

[5] Although AMS agreed to pay its welders, Coastline issued checks to the welders. Check stubs show Coastline withholding taxes (EX-15), and keeping time sheets for the Chiles Tonala project. (EX-14).

In July 10, 2001, Claimant filled out an employment application and was hired as a welder by AMS. (EX-13, 14, pp. 12, 13; Tr. 99). Claimant began repair work on a jack up rig (Chiles Tonala) on July 11, 2001 and worked 8 hours on that day, followed by 14 hours on July 12, 16 hours on July 13, and 12 hours on July 14 and July 15. The following week (Monday, July 16-July 22, 2001), Claimant worked 12 hour days for a total of 84 hours. The third week (Monday July 23-29, 2001 Claimant work the same schedule including July 29 when he was injured and was paid for an additional 84 hours. The following week which ended on August 5, 2001, Claimant was paid for 84 hours although he did not work due to his injury. On August 5, 2001 AMS laid Claimant off due to a reduction in force. (CX 14, pp 3-7; Tr.105). Claimant made $18.50 per hour, plus a per diem of $45.00 (Tr. 51, 52).

The Fifth Circuit in *Total Marine Services, v. Director,* 87 F.3d 774,777 (5th Cir. 1996) held that under the borrowed employee doctrine "'[o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the services of a third party so that he becomes the servant of that person with all the legal consequences of the new relationship." In determining whether a claimant is a borrowed, the Board utilizes the nine part test set forth in *Ruiz v. Shell Oil Co.,* 413 F.2d 310 (5th Cir, 1969) and *Gaudet v. Exxon Corp.,* 562 F.2d 351 (5th Cir. 1977) which includes the following;

> (1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
>
> (2) Whose work is being performed?
>
> (3) Was there an agreement, understanding or meeting of the minds between the original and the borrowing employer?
>
> (4) Did the employee acquiesce in the new work situation?
>
> (5) Did the original employer terminate his relationship with the employee?
>
> (6) Who furnished tools and place for performance?
>
> (7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Regarding those issues, AMS retained control over the employee and the work he performed. The work in question belonged to Coastline. There was an agreement between Coastline and AMS as detailed above. Claimant thought he was working for Coastline, but in fact, the application he signed was for AMS. AMS did not terminate Claimant's employment until after the July 29, 2001 accident. It appears as though Coastline furnished the tools and place of performance. Claimant's employment was of short duration of about 24 days. AMS retained the right of discharge and obligation to pay. Accordingly, considering all factors, I find that Claimant was an employee of AMS and not Coastline.

2. Testimony of Claimant:

Claimant is a 44 year old male who completed the 10th grade but can only read on the second or third grade level and perform simple math. (Tr. 36). Before his employment with Coastline and AMS he performed heavy work as a tree trimmer, painter, boilermaker, equipment operator, plant worker and offshore welder. (Tr. 37-40). About 90% of this work was land based. (Tr.41).

In 1983, Claimant while working on an oil rig twisted his back. (Tr. 43). Claimant overcame this injury and resumed heavy work until 1997 when working for A & B Builder scaffold collapsed striking him in the head. As a result, Claimant sustained severe neck injuries requiring two neck surgeries and was off work for 1½ years during which time he drew worker's compensation benefits. (Tr. 42, 103, 123; EX-17). Dr. Charles Clark, who performed the surgery initially, restricted Claimant from lifting more than 20 pounds, climbing and driving trucks. Later, Claimant came under the care of a Dr. Vick who removed these work restrictions. (Tr. 104, 105).

Claimant thereafter worked without incident until July 29, 2001, when working on a dock about 6 feet from the waters edge and attempting to tie down objects as bad weather approached, Claimant received an electrical shock. The

shock occurred as Claimant bent over to pick up a pipe and touched an improperly grounded generator causing Claimant to jump back and fall landing on his right side and elbow and hurting his low back and hip. (Tr. 44-53).

Claimant reported the incident to AMS personnel but continued to work.[6] The next day Claimant was too stiff and sore to work and remained in bed at a nearby hotel. On the following day, a safety man took Claimant to Dr. Vernon Doster for evaluation. (Tr. 55, 56). On exam, Claimant was tender on palpation to the right arm and right sacroiliac joint. X-rays showed narrowing of the L5-S1 disc space with an osteophyte at the anterior aspect of L-5. Dr. Doster prescribed Vioxx and released Claimant to full duty (Tr. 57, 58; TX-8). Dr. Doster told Claimant that should back and hip problems persist to see his personal physician when Claimant got home. (Tr. 59). Randy Burke also encouraged Claimant to see his own personal physician. (Tr. 60-62).

Claimant never resumed work, but rather returned home after which he sought the service of family practice physician, Dr. Larry Brown who saw Claimant on 12 occasions from August 14, 2001, to February 26, 2003 for complaints of back, hip, and leg pain. (Tr. 59, 60, 66-69; RX-4; CX-10). Despite this treatment Claimant continued to experience severe back, hip and right leg pain even with use of Vicodin ES and Soma. (Tr. 68-70). Dr. Brown recommended physical therapy, but Employer refused despite MRI findings showing chronic degenerative disc disease with spondylosis at L5-S1. (CX-3, p 18). Dr. Brown referred Claimant to Dr. Ronald Corley who saw Claimant on June 9, 2003. After examining Claimant, Dr. Corley's impression was degenerative disc disease at L5-S1 which was probably aggravated by the injury with recommendations for 3 to 4 weeks of physical therapy, and 3 to 4 weeks of work hardening. (EX-7).

Claimant testified that lifting occasionally produces a stabbing knife like pain in his lower back with radiates down his hip and right leg. Bending is limited depending upon use of medication. Claimant can stand and sit 30 to 60 minutes each, and lift 15 pounds. (Tr. 77-80). Dr. Brown told Claimant he knew what he could do allowing him to set his own limitations, but recommended no lifting over 15pounds with no frequent bending, stooping or squatting, i.e., no more than 2 hours for each activity. (EX-4. p. 24, 25). As of the last visit, Dr. Brown increased

[6] Claimant reported the incident to David C. Echols on February 29, 2001, who filled out an accident report stating: "John had one hand on the flat bed that holds the generator. When he reached down to pick up a piece of metal he was shocked. It had been raining a little, so everything was a little wet. He fell back on his butt." On July 30, 2001, Echols filled out a second accident report stating: "On 7-29-01 John fell, on 7-30-01 he was talking about having pain in his right hip. On July 31, 2001, Superintendent Dan Burke, filled out a supervisor's accident report in which he noted that Claimant had been shocked by equipment causing him to fall and hurt hip. (EX-13).

the lifting restriction to 10 to 15 pounds finding Claimant able to work an 8 hour day if allowed to alternate positions. (EX-4, p. 29).

In contrast, Claimant's former work for Employer required heavy lifting, and a lot of standing, climbing, and stooping which Claimant testified he cannot do. (Tr. 54). Since his accident on July 29, 2001, Claimant testified that he worked for AVC and Menard Welding. Claimant got the job with AVC because his cousin, Jessie Menard, was AVC's superintendent. AVC paid $18.50 per hour with $55.00 per diem. Claimant's work involved flagging for the rig, taking telephone calls, and some welding on steel boats over a period of several months. (Tr. 116, 117, 130). Jessie Menard allowed Claimant to alternate positions and to lie down during the day and take 2 hour lunches. (Tr. 81-83). On one occasion, Claimant drove a dozer, but had to stop after 3 hours because it involved too much jarring. (Tr. 84). Claimant's job with Menard Welding lasted about 4 to 5 months, paid $10.00 per hour, 7-8 hours per day, and 40 hours per week. (Tr. 118). A cousin, James Menard, owns Menard Welding and employed Claimant to weld aluminum gates in Hackberry, Louisiana. (Tr. 85, 86). However, on both jobs Claimant testified that he did only 30% of what was normally expected and would not have been hired except for the fact that his cousins either ran the job or owned the business. (Tr. 90, 91).

Concerning the jobs identified as suitable by Vocation Expert, Ms. Nancy Favaloro, Claimant testified that only one employer, Outback Steakhouse was taking applications and when he told them he was restricted to light duty they changed their position and said they were not taking applications. Further, when he applied for work at Luby's, Walmart, Monroe's Dry Cleaners, Domino's Pizza, none of these employers were hiring. (Tr. 91-94).

On cross Claimant admitted not working consistently in the past making between $6,000.00 to $18,000 per year because he was single and did not have to earn more, and that he had worked for as many as 4 employers per year in 1996, 1997, 2000, and 2001. (Tr. 118). Claimant admitted twisting his back on February 21, 2002 while descending steps at his home resulting in increased back pain. (Tr. 123). Claimant also admitted dancing on occasion at the VFW Hall, running a bush hog for Menard Welding for a short period of time, riding in a boat and jeep on occasion to check on a deer stands and refusing to take a second MRI because of only one day notice and receiving a written warning on July 26, 2001 for driving a fork lift carelessly. (Tr. 101, 105-107, 124-130; EX-10, 11).

3. Testimony of Dr. Larry Brown

Dr. Brown, who has been certified in family practice since 1988, testified as follows about his treatment of Claimant and work restrictions related to the July 29, 2001 accident. At the first visit of August 14, 2001, Claimant related details of the July 29, 2001 injury resulting in hip, back, and right arm pain. Claimant had normal range of motion, but straight leg raising intensified back pain. X-rays demonstrated narrowing of the L5-S1 joint with spur formation. Dr Brown ordered an MRI which was taken on September 10, 2001 and showed chronic degenerative disc disease with spondylosis at L5-S1 with spurs encroaching the neural foramina bilaterally. (EX-4, pp. 7, 8). By this visit, Claimant's right arm pain has resolved but the back pain remained and radiated into his leg. (*Id*. at 10). Dr. Brown recommended use of heat, and avoidance of strenuous activity with use of Vioxx, Soma, and Vicodin and no work even sedentary.

On the second visit of August 21, 2001, Claimant exhibited the same symptoms of low back pain with radiation, but with decreased range of flexion, extension, and left side bending with positive straight leg raising on the right and decreased sensation in the right foot. Dr. Brown recommended physical therapy three times a week. By the third visit of September 10, 2001, Claimant still exhibited the same symptoms with Dr. Brown again recommending physical therapy, which Claimant was not able to secure, and use of medications. By the fourth visit of October 16, 2001, Claimant reported an inability to secure physical therapy with increased pain including left arm pain, bilateral leg numbness for which Dr. Brown recommended continued use of heat to the back with muscle relaxers, pain medications and non-steroidal, anti-inflammatory medication, and no work. (*Id.* at 11-13). On the fifth visit of November 12, 2001, Claimant continued to exhibit restricted range of motion and an inability to secure therapy. On the sixth visit of December 21, 2001, Claimant complained about increased back pain with no improvements, no ability to secure physical therapy. Dr. Brown recommended an orthopedic consult because of lower extremity pain and tingling.

On the seventh visit of January 15, 2001, Claimant was still symptomatic. On the eight visit of February 21, 2002, Claimant complained of increased back pain as a result of a home accident wherein he slipped going down steps and twisted his back. (*Id.* at 14-16). Thereafter, Claimant saw Dr. Brown on 4 additional occasions: April 15, August 30, November 25, 2002, and February 26, 2003. Despite conservative treatment including use of various medications, Claimant's condition remained unchanged. On April 15, 2002, Dr. Brown in response to Claimant's request to return to work because of financial hardship,

released Claimant to light duty with no lifting greater than 15 pounds, no frequent bending, stooping, or squatting. (*Id*. at 17).

Dr. Brown testified that Claimant's complaints of pain were consistent with the type of accident he had and constituted an aggravation of an underlying back condition (degenerative disc disease). That the September, 2001, MRI failed to pick up soft tissue injuries, and that because of the injury, Claimant was limited to lifting no more than 15 pounds over a 2 to 4 hour period with no frequent bending, stooping, or squatting i.e., no more than 2 hours each for such activities. (*Id.* at 22, 23, 24, 29, 30). Further, Claimant should be permitted to alternate between sitting, standing and lying down during the day to relieve pain. (*Id.* at 25, 26). According to Dr. Brown, Claimant is not at maximum medical improvement because of the lack of physical therapy.

Dr. Brown further testified that Claimant's February 21, 2002, accident represented a jarring of an already aggravated process and that the neck pain he complained of was not associated with the July 29, 2001 accident.

4. Testimony of Dr. Jay Martin Barrash

On June 25, 2003, Dr. Barrash, a neurosurgeon, examined Claimant at Employer's request. The exam consisted of a medical history and description of events followed by a physical which showed Claimant to be in no acute distress, moderately obese with a well healed posterior, and anterior cervical scar, poor oral hygiene, and wheezing. Back spasms were not present, although, Claimant had a tender S1 joint on the right. Claimant could flex 90 degrees sitting but with S1 joint pain at 50 degrees when standing. Neurologically, Claimant had decreased sensitivity to pin in the entire right lower extremity with decreased vibratory sensation in the knees. After reviewing Claimant's MRI scan of August 29, 2001, (which Dr. Barrash considered incomplete), Dr. Barrash agreed that it showed degenerated, narrow L5-S1 disc space with a right bulge. (EX-5).

Dr. Barrash described Claimant as cooperative, but voluntarily limiting back flexion despite evidence of chronic degenerative disc disease with spondylosis at L5-S1 predating the July 29, 2001 injury. (EX-3, pp. 8, 9). Dr. Barrash opined that the spondylitic spurs that encroached the neural foramina bilaterally could cause pain and leg numbness. (*Id.* at 10). Dr. Barrash found no evidence precluding Claimant from welding, and opined that Claimant had a soft tissue injury that should have resolved within weeks to a few months, but no evidence of

any residual effects at presents. Dr. Barrash opined that physical therapy or work hardening were a waste of time insofar as the injury occurred more than two years ago. (*Id.* at 14). Further, Claimant had no permanent restrictions, no evidence of any aggravation of pre-existing back problem, and as of the exam, was at MMI. (*Id.* at 15). Dr. Barrash also testified that was common from persons with degenerative disc disease to have pain radiating down their leg. (*Id.* at 22).

5. Testimony of Ms. Nancy Favaloro

Ms. Favaloro met with Claimant on October 16, 2003 and thereafter generated a vocational analysis and labor market survey. Ms. Favaloro found Claimant limited to simple reading and math but with transferable skills involving use of tools and equipment. Using the following limitations which she attributed to Dr. Brown of no lifting more than 50 pounds and no frequent bending, stooping and carrying she identified the following jobs that were available for Claimant:[7]

Rice Processor	working in either packaging or sewing departments at $5.15 per hour; standing most of day with no appreciable lifting;
Cafeteria Line Server at Luby's in Beaumont-	serving food to customers and wiping down counter with occasional sweeping and mopping, lifting less than 10 pounds at $5:15 per hour;
Greeter at Walmart-	greeting customers and providing shopping carts, lifting less than 15 pounds at minimum wage of $5.15 per hour;
Dry Cleaner\Presser	detailing and pressing garments, standing while working, lifting not to exceed 20 pounds at minimum wage of $5.15 per hour.
Delivery Drive for Domino's Pizza-	delivering prepared food to customers, answering phone, doing general cleaning, driving own

[7] Ms. Favaloro was apparently not provided with a copy of Dr. Larry Brown's deposition of April 14, 2003, which set forth more severe work restrictions.

	vehicle to make deliveries at minimum wage of $5.15 per hour.
Cook at Outback Steakhouse-	preparing food items, standing and walking throughout the day, lifting up to 20 pounds at minimum wage of $5.15 per hour
Inspector	inspecting garments in factory at $6.00 per hour, sedentary position with ability to stand and walk, lifting no more than 10 pounds.

(EX-16) (Tr.139-143).

On cross, Ms Favaloro admitted that the Rice Mill, although having an opening, was not hiring the greeter position involving less than 40 hours per week; there were split shifts at the cafeteria; and the cook position involved occasionally lifting more than 40 pounds. Ms Favaloro further admitted that the only jobs actually hiring were the dry cleaner, delivery driver and cook positions. (Tr. 148-150, 154, 164, 165).

6. Testimony of David Lynn Martin

David Lynn Martin testified about the wages and work he performed in the 52 week period prior to Claimant's July 29, 2001 injury. During that period, Martin worked as a welder for Premiere, Incorporated, an oil field service company with facilities in Winnie, Texas, and New Iberia, Louisiana. Martin worked out of the Winnie facility doing pipe shop welding and truck repairs about 60% of the time with the remaining 40% spent welding in the field on offshore drilling rigs in the Gulf of Mexico from Texas to Alabama. (CX-16, pp. 5, 6). Martin worked a minimum of 40 hours per week, plus some overtime at time and a half.

On cross, Martin admitted never having worked for either Coastline or AMS, but had worked for a staffing company that provides manpower to other employers. (*Id.* at 11). Martin testified that in the past 5 years he had worked for 3 separate employers. On May 26, 2001, Martin was injured and placed in light duty where he made $9.00 per hour, 40 hours per week. During the past 5 years, Claimant has averaged about $40,000 per year. Martin's employment with

Premiere has been steady requiring him to lift up to 100 pounds. (*Id.* at 12, 13). When working in the shop Claimant made $9.00 per hour verses $13.00 per hour in the field. (*Id.* at 16-17). Martin is a certified 2G welder doing stick and MIG (flex core wire) welding.

IV. DISCUSSION

IV.1 Contention of Parties

Claimant contends that at the time of Claimant's accident, he had two employers, namely Coastline and AMS, and that both were liable for unpaid medical bills which included Dr. Corley's bill for Claimant's June 16, 2003 examination, and Brookshire Brothers Pharmacy bills of $2,518.26[8] Both employers were also responsible for furnishing 3 weeks of physical therapy found reasonable and necessary for Claimant to reach MMI by all treating physicians. In response, AMS admits that Claimant worked for AMS and Coastline, but has no defense for non-payment of medical expenses except to claim that Claimant was not injured on July 29, 2001.

Claimant argues that he is entitled to a Section 20 (a) presumption because the credible evidence showed that on July 29, 2001, he suffered a work related injury causing permanent restrictions which Employer never rebutted. Indeed, none of the initial reports questioned the existence of any injury. Dr. Brown testified that Claimant's complaints of pain were consistent with the type of accident described by Claimant. (EX-13, pp. 1-3). Dr. Corley opined that the workplace injury aggravated Claimant's pre-existing back condition. (CX-3, p. 2). Even Dr. Barrash testified that Claimant was in need of treatment after the accident. (EX-3, pp. 18, 19). Assuming *arguendo,* that Employer rebutted the presumption requiring a weighing of all evidence, all the evidence points to a work related injury. The fact that an accident report refers to Claimant hurting his hip was due to Claimant's belief that the hip included the low back area.

In response, AMS contends that Claimant failed to establish a *prima facie* case by proving that he suffered some harm or pain and that an accident occurred or working conditions existed could have caused the harm. Further, Claimant

[8] Employer/Carrier did not pay Dr. Corley's bill until the eve of trial, October 27, 2003.

cannot rely on a Section 20 (a) presumption because there is no credible evidence to establish that any accident occurred.

Concerning the nature and extent of injury, Claimant contends that he has not reached maximum medical improvement because of the denial of needed therapy and work hardening as confirmed by Dr. Brown and Dr. Corley's medical records. Thus, Claimant's condition must be described as temporary in nature. Further, when his testimony about pain and work limitations, which is supported by Dr. Brown's comments, and work restrictions is considered, it is evident that he cannot resume his former work or any other job, and consequently must be found totally disabled. Claimant argues that Employer failed to establish suitable alternative employment, in that his post-injury work for AVC and Menard Welding were sheltered work, because he was able to secure these positions only by the beneficence of his cousins, who either owned or ran the jobs in question, allowing Claimant to perform only about 30% of the work and lie down on the job to relieve pain during the day. No employer would hire him, and thereafter, allow him to take 3 days a week off to attend physical therapy.

Further, and more important, none of the jobs listed by Ms. Favaloro conformed to the work restrictions set forth by Dr. Brown, which limited Claimant to lifting between 10-15 pounds over a two to four hour period while being allowed to lie down and take breaks as need during an 8 hour day. Further, Claimant lives 52 miles from Beaumont and 36 miles to Orange, where all the suitable jobs were located. Based on the current mileage reimbursement rate of $.36 per mile it would cost Claimant $37.44 per day to travel from his home to Beaumont and $27.36 per day to travel from his home to Orange. On minimum wage, Claimant would make only $41.20 per day leaving him with either $3.76 or $13.84 after 8 hours of work, a sum hardly reasonable considering the driving involved. In addition, Claimant listed other reasons for the inappropriateness of job cited by Ms Favaloro, including the non-availability of such positions when Claimant inquired.

In response, AMS contends that Claimant is capable of doing light work and after the accident engaged in suitable work as a boilermaker for AVC where in 2002 he worked 40 hours per week, for several months, welding boat earnings $18.50 per hour with a $55.00 per diem, plus 7 to 8 hours per day on a steady basis (4 to 5 months) at $10.00 per hour. In addition vocational expert, Nancy Favaloro, established suitable alternative jobs paying between $5.15 per hour and $10.00 per hour resulting in an average weekly wage of at least $206.00 per week which

exceed Claimant's average weekly wage of $173.57. Thus, Claimant suffered no economic loss and no disability under the Act.

Concerning the issue of average weekly wage Claimant argues that Section 10 © should be applied by taking the number of days he worked for Employer (26 days) or 3.714 weeks, dividing that into his earnings of $4,745.00, to arrive at an average weekly wage of $1,277.60 with a corresponding average weekly wage of $851.73. Alternatively I should use the wages of David Marin, a welder who worked in the same geographic area as Claimant and had an average weekly wage of $934.91. If all else fails, Claimant urges that I use the wages he earned in the 52 week period prior to his accident ($16,345.91) divide by 52 resulting in $314.34 with a compensation rate of $209.56 compelling use of he minimum rate of $233.46.

On the remaining issues of medical treatment, expenses, and mileage, Claimant argues that Employer/Carrier pay for all reasonable and necessary care (physical therapy and work hardening) ordered by Drs. Brown and Corley and pay the following medical expenses: Claimant ($360.00), Newton Family Clinic ($598.00); Memorial Hermann Hospital ($2,152.00), Orange Radiology ($331.20), Dansley Inc., (Brookshire Brothers Pharmacy of Kirbyville ($2,518.26) plus mileage to and from his residence to Dr. Brown's office a distance of 96 miles times 12 trips at $.36 per mile for a total of $414.72.

IV.2 Credibility and Causation

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Ass's v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir.

1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc., v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc., v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary…
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v.*

Bethlehem Steel Corp., 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's un-contradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding the claimant failed to meet the second prong of establishing a

prima facie case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. May 21, 2003). The Court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (citing *Conoco, Inc.,* 194 F.3d at 690). *See Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

Employer argued Claimant should be discredited on the issue of whether an accident occurred because: (1) Bobby O' Neil, an alleged eye witness and friend of Claimant, failed to testify; (2) Claimant failed to notify or seek medical benefits from AMS until one and a half years after the alleged accident; (3) Claimant sought treatment from Dr. Vernon Doster on July 31, 2001, who released him to full duty; (4) Dr. Brown, who treated Claimant on numerous occasions after the accident found no objective medical evidence of any acute injury and released him to light duty on April 15, 2002; (5) subsequent to Dr. Brown's treatment, Dr.

Ronald Corley treated Claimant, found only underlying degenerative disc diseased and recommended 3 to 4 weeks of physical therapy and 3-4 weeks of work hardening which AMS approved on October 27, 2003, but which Claimant failed to undergo; (6) neurosurgeon, Dr. Martin Barrish, examined Claimant on June 25, 2003 and was unable to find objective evidence of a traumatic injury or aggravation of a pre-existing condition; (7) Claimant concealed the fact that he had been permanently restricted to light duty in 1997 as a result of work related neck surgery; and (8) Claimant was evasive and inconsistent at the hearing.

In considering the issue of Claimant's credibility, I note that Bobby O'Neil never testified. However, neither did any supervisor. Three accidents reports moreover, never raise the issue of Claimant's credibility. Neither did any supervisors for AMS or Coastline. Rather, all assumed that an accident had occurred with superintendent Burke telling Claimant to see his personal physician if symptoms persisted. Even Dr. Doster, the first physician who examined Claimant at Employer's request after the accident, never questioned the existence of Claimant's electric shock. Dr. Brown, who treated Claimant on numerous occasions never, questioned Claimant's injury. Rather, he found Claimant's complaints to be consistent with the type of injury alleged. Contrary to Employer's assertions, I found Claimant to be rather straight forward while testifying despite limited academic ability. Contrary to Employer's assertions, Claimant did not try to conceal the fact that he had been permanently restricted to light work following a 1997 accident.

Regarding the July 29, 2001, incident I credit Claimant's version of the incident and find that the electrical shock he experienced aggravated his back condition as both Drs. Brown and Dr. Corley concluded. While Dr. Barrash's report is sufficient to rebut the Section 20 (a) presumption, I find after weighing all the evidence including extensive treating records by Dr. Brown, that the preponderance of the credible testimony clearly shows that Claimant back and leg complaints were related to Claimant's July 29, 2001 back injury.

IV.3 Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10)(2003). Disability is an economic

concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). In this case, it is clear that Claimant is not at MMI because of the lack of therapy and work hardening as recommended and approved by Drs. Brown and Corley for Claimant's betterment. See *Abbott v. L.I.G.A.* 27 BRBS 192, 200-201 (1993) *aff'd*, *L.I.G.A. v Abbott* 29 BRBS 22 (CRT) (5th Cir. 1994).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP, v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540. 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions: (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.
>
> In this case, I am convinced that none of the jobs cited by the vocational expert are suitable because none of these jobs take into consideration the entire set of restrictions imposed by Dr. Brown, the

> physician who is most familiar with Claimant's condition having treated him over a considerable period of time involving 12 visits. Claimant's work limitations include the following: lifting no more than 15 pounds over a 2 to 4 hour period with avoidance of frequent bending, stooping or squatting, i.e., no more than 2 hours each for such activities. In addition, Claimant should be permitted to alternate between sitting, standing and lying down during the day to relieve pain. As such, Claimant cannot perform either his past relevant work or any job cited by Ms. Favaloro as suitable. Claimant's inability to do these jobs is directly related to his July 29, 2001 work injury. The February, 2002, incident at home where he jarred his back going down stairs while aggravating his back condition did not increase his overall disability, and did not result in any additional work restrictions. Even Dr. Barrash found no restrictions as a result of this incident and would allow Claimant the ability to resume his former welding duties.

Regarding Claimant's work for AVC and Menard, I find such to be sheltered work in that he did no more than 30% of the required work and was permitted to lay down at will to relieve pain. Such work was of limited value to those employers and certainly did not justify the wage paid. This is a classic case of the beneficent employer, whereby an employee is able to get and keep a job only due to the beneficence of the employer who in this case happens to a cousin. Such employment is akin to one where an employee would not be replaced if the job were terminated and where the employee is treated with "kid gloves" providing some but little benefit to employer and certainly one where the wages paid were not justified by the service rendered. *Patterson v. Savannah Mach. & Shipyard,* 15 BRBS 38 (1982); *Shoemaker v. Schoavpne & Sons. Inc.,* 11 BRBS 33 (1979).

IV.4 Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1) (2002); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1) (2001). Where neither Section 10(a) not Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. §

910(c) (2002); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i)(2002).

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a)(2001); *See also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000) (stating that Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a)(2001). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co. v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998).

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c) (2001); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b) (2002). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred

times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id*. To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id*. at 130; *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 822 (5th Cir. 1991).

If neither of the previously discussed sections can be applied "reasonably and fairly," then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c) (2002); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297-98 (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821-22 (5th Cir. 1991); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c)(2002).

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000) (finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th

Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. J*ackson v. Potomac Temporaries, Inc.*, 12 BRBS 410,413 (1980).

In this case, neither Section 10 (a) nor (b) is applicable because of Claimant's sporadic work history and lack of comparable employees. David Lynn Martin is certainly not a comparable employee because he has never worked for Employer and when he has worked as a welder has found considerably more employment doing pipe shop welding and welding offshore. Employer would have me use Claimant's earnings for 1996, 1997, 2000, and 2001, which amounts to $36,103.14 divided by 4 for an annual wage of $9,025.79 with a corresponding average weekly wage of $173.57 in accord with *Empire United Stevedores v. Gatlin* 936. F.2d 819 (5th Cir. 1991). Claimant proposed 3 different methods involving: (1)use of David Lynn Martin's wages which I have already found are not representative due to Claimant's sporadic work history; (2) Claimant's wages over a 26 day period during which time he earned $4,745 for a weekly average of $1,277.60; or (3) Claimant's wages in the 52 weeks prior to his injury which totaled $16,345.91 divided by 52= $314.34 times 2/3 =$209.56 for a minimum compensation rate of $233.46. After reviewing all proposals, I find that Claimant's last choice resulting in the minimum compensation rate to be the most accurate reflection of what Claimant's earning potential was giving due deference to Claimant's earnings at the time of injury and sporadic work history. Employer proposal of using 1997 and 2001 is inappropriate because of time lost in both years due to work related injuries.

IV. 5 Medical Treatment

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General*

Dynamics Corp., 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975) (stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

Employer has paid a portion of the medical expense amounting to $1,700.00. As of the hearing, there remained a total of $5,899.46 in unpaid medicals by Employer including Newton Family Clinic $598.00; Memorial Herman Hospital $2,152.00); Orange Radiology $331.20; Brookshire Brothers Pharmacy $2,518.26, plus $360.00 to Claimant in reimbursement for medical he paid out of pocket. In addition, Employer has not reimburse Claimant for mileage to Dr. Brown's office in the amount of $414.72 representing 96 miles x 12 trips x $.36 per mile. Employer is required to pay this cost plus the medical expense associated with physical therapy and work hardening as recommended by Drs. Brown and Corley and any future reasonable medical expense associated with the July 29, 2001 work related injury.

IV. 6 Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et. al.*, 17 BRBS 20

(1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

IV. 6 Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer (AMS) shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from July 29, 2001 to present and continuing based on an average weekly wage of $314.34 resulting in the minimum compensation rate of $233.46.

2. Employer (AMS) shall be entitled to a credit for all wages paid to Claimant after July 29, 2001 and for compensation previously paid to Claimant.

3. Employer (AMS) shall pay Claimant for all medical expenses set forth in Section IV.5 above, plus future reasonable medical care and treatment arising out of his work-related injuries including physical therapy and work hardening pursuant to Section 7(a) of the Act.

4. Employer (AMS) shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield

immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE